# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

## No. 34.

THE JURAGUA IRON COMPANY, LIMITED, APPELLANT,

*vs.*

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

## BRIEF FOR APPELLANT.

The petitioner and appellant, The Juragua Iron Company, Limited, a corporation created and organized under the laws of the State of Pennsylvania, sued the United States, to recover upon an implied contract, upwards of $33,000, being the alleged value of certain permanent buildings, dwelling houses, offices, and the like, located near Siboney, in the Island of Cuba, which buildings together with their contents had been deliberately destroyed by fire, on or about July 11, 1898, pursuant to and by virtue of the official order of Major General Nelson A. Miles, commanding the United States military forces, then stationed in said Island. Such deliberate destruction of said buildings and contents was deemed a "military necessity" and was executed

with a view to preserving the health of said forces and to prevent the possible spread of yellow fever among them.

In its petition, filed in the court below, the company averred that it had been incorporated for the purpose among others, of purchasing and owing in the Island of Cuba lands containing iron ore and other minerals, and of mining said ores, and bringing the same to market in the United States and elsewhere, and also of owning all improvements, appliances, tools, machinery and supplies, necessary for the mining, manufacturing, transporting and vending of any of its property or products or convenient for purpose of enabling it to carry on its business to the best advantage; that in addition to valuable mines of iron ore, contained in and upon the real estate so owned by it, said real estate had been improved by certain permanent buildings, such as dwelling houses, stables, stores, offices, blacksmith shops, and hospital furnished with necessary furniture and equipment for the comfortable maintenance of its officers, agents, and employees engaged in carrying on its business; that while in the peaceful occupation of said property, having observed a strict neutrality with respect to the troubles then existing in said Island, said properties, by direction of the commanding officers of that portion of the United States army in such vicinity, "were deliberately and by way of precaution taken possession of by said troops" and subsequently, "by the deliberate command of such officers, many of said buildings * * * were burned or otherwise destroyed" whereby it sustained damages in the sum of $33,566 as per schedule set forth.

It was further averred that none of the damages so sustained resulted from "warlike engagements" or were inflicted "in the course of active hostilities," but were solely "the result of the deliberate action and precautions taken and exercised by said bodies of troops acting under the directions of their commanding officers," and "as such tak-

ing of private property for public use without just compensation is expressly prohibited by the constitution and laws of the United States," the latter thereby became indebted to the petitioner in the full sum of the damages by it so sustained. In opposition to this petition the United States filed the customary traverse and asked that the petition be dismissed.

Upon the proofs submitted the Court of Claims found the pertinent facts as follows, viz.:

I.

"The Juragua Iron Company (Limited) is a corporation duly created and existing under the laws of the State of Pennsylvania, having its principal office and place of business in the city of Philadelphia, in that State, and is now, and for many years has been, engaged in the business of mining and selling iron ore and other mineral products in the United States, Cuba, and elsewhere, and in manufacturing iron and steel products, and was so engaged at the opening of the late war with Spain. To enable it to carry on said business, it owned, leased, and operated mines situate in the island of Cuba, and maintained offices, works, and the necessary tools, machinery, equipments, and supplies for said business, in the Province of Santiago de Cuba, at or near Siboney, Firmeza, and La Cruz. In addition to its mines, works, and their equipments, it also owned real estate at or near said city of Siboney, which was improved by 66 buildings of a permanent character, used for the purposes of its business and occupied as dwellings by its employees, and for other purposes."

II.

"That in the year 1898, and while the war with Spain was in progress, the lives of the United States troops who were engaged in military operations in the Province of Santiago de Cuba, in the belligerent pros-

ecution of the war, became endangered by the prevalence of yellow fever, and it was deemed necessary by the officers in command, in order to preserve the health of the troops and to prevent the spread of the disease, to destroy all places of occupation or habitation which might contain the fever germs. On or about the 11th day of July, 1898, General Miles, commanding the United States forces in the island of Cuba, because of the necessity aforesaid and by the advice of his medical staff, issued orders to his subordinate officers to destroy by fire these 66 buildings at Siboney, in the island of Cuba, which belonged to the claimant, and had been used for the purposes aforesaid; and pursuant to said order, said buildings and their contents were destroyed by fire by the military authorities of the United States; the reasonable value of which buildings at the time and place of destruction was $23,130; and the reasonable value of the drills, furniture, tools and other personal property so destroyed by fire under the order aforesaid was seven thousand nine hundred and eighty-six dollars ($7,986), making a total of thirty-one thousand one hundred and sixteen dollars ($31,116)."

Upon such state of facts the Court of Claims concluded as matter of law that the defendants were not liable to the petitioner for the payment of any sum on account of the damages so sustained by it and adjudged that its petition be dismissed.

## Assignment of Errors.

The Court of Claims erred in holding—

(1) That the property in question was "enemy property" and as such was liable to seizure and destruction by the military forces of the United States without obligation on the part of the United States to make reparation therefor;

(2) That even if appellant should be regarded in the light of a loyal citizen of the United States its property, by reason of its situation, was liable to seizure and destruction

by the military authorities of the United States, in case of "military necessity" without obligation on the part of the United States to make reparation therefor;

(3) The Court of Claims further erred in holding that such "military necessity" existed in fact, and that therefore claimant's petition should be dismissed.

## Jurisdiction.

1. Of the Court of Claims.

2. Of the Supreme Court of the United States.

### 1.

The Court of Claims had jurisdiction to consider and adjudge this claim.

The claimant was a domestic corporation organized under the laws of the State of Pennsylvania. As such its right of access to the Court of Claims in connection with any claim against the United States cannot be gainsaid. If its claim as stated in its petition be well founded and within the limits of the jurisdictional powers conferred upon that court judgment should have been given in its favor.

The Court of Claims has jurisdiction to hear and determine any claim of a citizen of the United States, or of a domestic corporation, preferred against the United States, if it be "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States," provided it neither grows "out of the destruction or appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion" (R. S., U. S., 1059) nor—assuming that section 1066 of the Revised Stat-

utes was not repealed, as is sometimes contended, by the act of March 3, 1887 (24 Stats. L., 505)—grows out of nor is "dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

Assuming section 1066 of the Revised Statutes to be still in force it is to be noted that in order to bring such a claim within the prohibited class the connection between the treaty and the claim must be direct and proximate, that is "the *right itself*, which the petition makes to be the foundation of the claim, must have its origin—derive its life and existence—from some treaty stipulation" (United States *v.* Weld, 127 U. S., 51).

The act of March 3, 1887, ch. 359, "To provide for the bringing of suits against the United States," 24 Stats. L., 505, as amended by the act of June 27, 1898, ch. 503, § 1, 30 Stats. L., 494, was clearly intended to enlarge the jurisdiction of the Court of Claims and seemingly was intended to repeal the prohibition of section 1066 *supra*. Under this act the Court of Claims has jurisdiction to hear and determine "All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable," provided such claims do not grow out of the late civil war.

The property, the value of which is sought to be recovered in this action, was owned outright by the claimant. It was neither warlike nor contraband in character. It was being used in the furtherance of peaceful trade and commerce. It had been located where it was found by the military forces

of the United States in the furtherance of that "good correspondence" between the United States and Spain "and their citizens without exception of persons or places," which the treaty of 1795 between said high parties declared should be "firm and inviolable." It was deliberately burned by order of the Major General commanding the United States forces in the Island of Cuba, because "to preserve the health of the troops, and to prevent the spread of the disease" (yellow fever), and it was deemed necessary "to destroy all places of occupation or habitation which might contain the fever germs." No indemnity has at any time been paid to the claimants for the property so destroyed. At no time has the United States made claim of title to or denied the title of the claimant in said property. In the absence of circumstances constituting a good defense the law implies a promise to pay to the owner the reasonable value of the property so taken and destroyed.

Carpenter *v.* United States, 17 Wallace, 489.
United States *v.* Great Falls Mfg. Co., 112 U. S., 645.
Same *v.* Same, 124 U. S., 581.
Same *v.* Lynah, 188 U. S., 445.
Philippine Sugar Estates Dev. Co. *v.* United States, 39 Court of Claims, 225, 237.
Same *v.* Same, 40 Court of Claims, 33.

The jurisdiction of the Court of Claims to hear and determine this controversy would seem to be clear. It was not questioned by the United States in that court and probably will not be questioned here.

2.

As the amount in controversy exceeds three thousand dollars this court has jurisdiction to entertain the appeal filed herein (R. S. U. S., sec. 707).

## Merits.

On April 25, 1898, the Congress of the United States of America enacted "An act declaring that war exists between the United States of America and the Kingdom of Spain," which act was approved by the President on the above date, and is in the following words, viz:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* First. That war be, and the same is hereby declared to exist, and that war has existed since the twenty-first day of April, Anno Domini eighteen hundred and ninety-eight, including said day, between the United States of America and the Kingdom of Spain.
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> "Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this act into effect."
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> 30 Stat. L., Ch. 189, p. 364.

On April 20, 1898, the two Houses of the Congress passed Joint Resolution Number 24:

> "For the recognition of the independence of the people of Cuba, demanding that the government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and directing the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect"

in the followings terms:

> "Whereas the abhorrent conditions which have existed for more than three years in the Island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a

disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battleship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and cannot longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled:* First. That the people of the Island of Cuba are, and of right out to be, free and independent.

"Second. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

"Third. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

"Fourth. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people."

Prior to April 21, 1898, there had been and, at least up to the moment of the enactment of the above declaration of war, there was in force certain articles of the treaty of Friendship, Limits and Navigation concluded between the United States of America and Spain on the 27th day of October, A. D. 1795, ratifications of which were exchanged April 25, 1796, and proclaimed August 2, 1796 (Treaties and Conventions, 1776-1887, p. 1006).

Said Treaty, among other things, declared that—

"ARTICLE I. There shall be a firm and inviolable peace and sincere friendship between His Catholic Majesty, his successors and subjects, and the United States and their citizens, without exception of persons or places."

"ARTICLE VI. Each party shall endeavor, by all means in their power, to protect and defend all vessels and other effects belonging to the citizens or subjects of the other, which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover, and cause to be restored to the right owners, their vessels and effects which may have been taken from them within the extent of their said jurisdiction, whether they are at war or not with the Power whose subjects have taken possession of the said effects."

ARTICLE VII. "And it is agreed that the subjects or citizens of each of the contracting parties, their vessels or effects, shall not be liable to any embargo or detention on the part of the other, for any military expedition or other public or private purpose whatever;" * * *

ARTICLE XI. "The citizens and subjects of each party shall have power to dispose of their personal goods, within the jurisdiction of the other, by testament, donation, or otherwise, * * * and where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by being an alien, such subjects shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of detraction on the part of the Government of the respective States."

ARTICLE XIII. "For the better promoting of commerce on both sides, it is agreed that if a war shall break out between the said two nations, one year after the proclamation of war shall be allowed to the merchants in the cities and towns where they shall live for collecting and transporting their goods and merchandises, and if anything be taken from them, or

any injury be done them within that term by either party, or the people or subjects of either, full satisfaction shall be made for the same by the government."

ARTICLE XVI. "This liberty of navigation and commerce shall extend to all kinds of merchandizes excepting those only which are distinguished by the name of contraband; * * * These merchandizes which follows shall not be reckoned among contraband or prohibited goods; That is to say * * * tin, iron, * * * coals, * * * and all other goods whatever, which have not been worked into the form of any instrument prepared for war, by land or by sea, shall not be reputed contraband, much less such as have been already wrought and made up for any other use;" * * *

The above articles were expressly confirmed by Article XII of the "Treaty of Amity, Settlement and Limits" concluded between the same high parties February 22, 1819, ratified and proclaimed February 22, 1821 (Treaties and Conventions, 1776-1887, pp. 1016, 1020).

Subsequently to 1863 and throughout all of the time of consequence in connection with this cause there was in force War Department General Orders No. 100, being the Instructions issued by the War Department of the United States of America for "the government of armies of the United States in the field, prepared by Francis Lieber, LLD., and revised by a Board of Officers of the United States Army."

Among such "Instructions" appear the following, which are pertinent here:

"Martial Law—Military Jurisdiction—Military Necessity—Retaliation.

"1. How Established.—A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or

occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

"The presence of a hostile army proclaims its martial law.

* * * * * * *

"4. Effects.—Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military forces, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

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"7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

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"10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety and the safety of its operations.

* * * * * * *

"1. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerent in time of peace, and avowedly intended to remain in force in case of war between the contracting parties.

* * * * * * *

"14. Military Necessity.—Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

"37. Private Property.—The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

"This rule does not interfere with the right of the victorious invader to tax the people or their country, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

"38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the Army of the United States.

"If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity."

These instructions were issued, without modification, for the government of the armies of the United States during the war with Spain in 1898.

Davis, Elements of International Law, 3d ed., 1908, Appendix A, p. 505.

It was within the purview and under the protection of the public policy of the United States as thus expressed, and guaranteed that the claimant established certain of its works and properties upon and within the Island of Cuba, and was carrying on there the peaceful pursuits of commerce, when it was subjected to the seizure and destruction for which it now seeks reparation.

The burning of its houses, offices, etc., as set forth in the finding of fact numbered 2 occurred on or about July 11, 1898.

On July 18, 1898, the Adjutant General of the United States Army, Brigadier General H. C. Corbin, promulgated War Department General Orders No. 101 as follows:

"The following, received from the President of the United States, is published for the information and guidance of all concerned:

"EXECUTIVE MANSION,
"WASHINGTON, *July* 13, 1898.

"TO THE SECRETARY OF WAR.

"SIR: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the Province of Santiago, and the occupation of the territory by the forces of the United States, render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

"The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, coöperate with the United States in its efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible."

* * * * * * *

"One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the

government of the country in its own right, and all arms, and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways and boats belonging to the State may be appropriated to his use, but unless in case of military necessity they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all school houses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or of works of science or art, is prohibited, save when required by urgent military necessity.

"Private property, whether belonging to individuals or corporations, should be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained."

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"Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given."

Whether the provisions of Article V of the amendments of the Constitution of the United States, to the effect that private property shall not "be taken for public use, without just compensation," is directly applicable in the facts of this case may possibly be questioned. In so far as the rights of citizens of the United States domiciled in Cuba are concerned, it might well be contended that under the circumstance above disclosed its protecting influence accompanied the army of the United States into that island. In determining

the rights of the parties to this cause this provision will at least be regarded as persuasive if not controlling.

It is stated in the findings of fact, and the statement is reiterated in the opinion of the Court of Claims, that in addition to being a Pennsylvania corporation the claimant had "its principal office and place of doing business in the city of Philadelphia;" that it was engaged in the business of mining and selling iron ore and in manufacturing iron and steel products, and was so engaged "at the opening of" and "during the Spanish war" (R., 5, 6); that in the furtherance of such business it maintained offices and manufacturing works in Cuba, and prior to July 11, 1898, owned, in connection with such works, the sixty-six (66) buildings which were used by its employees as dwelling houses, storehouses, and offices, and which on said date were burned by order of Major General Miles, then in command of the United States forces in Cuba, "to prevent the spread of the yellow fever then prevalent in that vicinity." It is not found or stated that these buildings were infected, nor does it appear that any case of yellow fever had ever been housed or cared for in one of them. The only finding on that subject is that, "in order to preserve the health of the troops and to prevent the spread of the disease," "it was deemed necessary" * * * "to destroy all places of occupation or habitation *which might contain the fever germs.*" It is further explained in the opinion that "at the time of the destruction of these houses, troops of the United States were stationed near them, and they were burned for the purpose of preserving the health and lives of these troops," it being further explained that, "In connection with these houses, some furniture and tools belonging to the claimant were also incidentally destroyed by said fire."

It is to be noted that the burning of these buildings did not take place in the course of any "military operation," such

as an attack or bombardment, nor as a preliminary thereto, nor was it done to destroy the cover of the enemy or to render his approach or retreat the more difficult. It does not appear that any body of the enemy troops was in the vicinity, and the court will so far take judicial cognizance of the history of the times as to recall that no collision between the troops of the United States and Spain occurred in the vicinity of Siboney or, indeed, anywhere else in Cuba after the landing of Major General Miles, commanding on that Island. At the time of this burning the United States forces held possession and were in the actual occupation of the country surrounding Siboney, including the property and its improvements here in question.

In this state of affairs, the learned court below declared that the status of the property destroyed, that is, whether it was "enemy property" or property of a citizen of the United States, was the first question to be considered in the determination of the case. It seems to have been the only question necessary for its determination for the court concludes that "whether considering the property destroyed as 'enemy property,' or otherwise, we do not believe the claimant is entitled to recover and the petition is dismissed" (R., 8).

In support of the assumption that the dwellings in question were "enemy property" and hence subject to destruction by the United States forces in the field, without liability to make compensation therefor, the learned court quotes somewhat freely from the works of learned writers on International Law and cites the opinion and judgment of this court in Thirty Hogsheads of Sugar *v.* Boyle, 9 Cranch, 191.

In support of the conclusion that even if considered as the property of an American citizen no cause of action exists against the defendant that court cites the case of Pacific Railroad *v.* United States, 120 U. S., 227.

It is thought that the case at bar upon its facts is readily distinguishable from the cases cited, and that the expressions quoted from the learned publicists were not used in relation to any such condition of affairs as confronted the United States with respect to Cuba and its inhabitants during the war with Spain.

That war was not against Cuba nor against the Cuban people, nor against aliens domiciled or found within its borders and there engaged in the peaceful pursuits of commerce. It was a war solely against Spain, undertaken by the United States because of the "abhorrent conditions" which had been brought about in Cuba by Spain and which "could not longer be endured." It was undertaken by the United States in the interest of Cuba and on behalf of her peoples, and because those people were "and of right ought to be free and independent," and because it was the duty of the United States to demand "that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters."

It is not to be forgotten that at the very outset the United States formally disclaimed "any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof," nor that throughout the military operations in that island the United States troops had the active and friendly coöperation of the Cuban forces and people and "generously shared their scanty food with the 5,000 Cuban patriots in arms and the suffering people who had fled from" Santiago de Cuba (Report War Department, 1898, vol. 1, pt. 2, p. 28); nor that very early in the conflict an important expedition under Lieutenant-Colonel Dorst, U. S. V., had landed on the north coast of Cuba "a steamer load of the munitions of war most needed, including 7,500 rifles, 1,000,000 cartridges, 5,000 uniforms, and other material needed by the 10,000 Cubans under General Garcia" (*ibid,* p. 11); nor that the Congress of the

United States, on May 18, 1898, authorized the President and general officers commanding troops in Cuba "to furnish to the Cuban people such arms, ammunition, equipments, and military stores and supplies as they may require to increase the effective fighting force in the existing war against Spain" (30 Stats. L., 419), and also made appropriations for the relief of the destitute Americans, as well as destitute Cubans who were inhabitants of the island (30 Stats. L., 220, 419, 1069).

See Neely *v.* Henkel, 180 U. S., 109.

But even if this were not all so, and if the mere situs of the claimants' property within the territorial sovereignty of the enemy stamped it as "enemy property," nevertheless, under well-recognized principles of modern international law, as well as under the modern military law governing the armies of the United States in the field, and binding as well upon the Government as upon those who become subject to its power, the Juraqua Iron Company became and is entitled to compensation for its property so seized and destroyed.

Article 38, sec. 11, General Orders No. 100, *supra.*

General Orders No. 101, *supra.*

General Orders No. 101, promulgated through the War Department by President McKinley, did not announce any new principle either of law or liability. It merely reiterated certain well understood principles of international law, founded in equity and moral right and accepted and acted upon by all civilized nations. It was scarcely more than a reiteration in condensed form, of Lieber's instructions, as proclaimed by direction of President Lincoln in 1863 in General Orders No. 100; afterwards adopted by the United German Empire for the government and regulation of its armies; formulated into a code by Bluntschli; made the basis of the Brussels agreement of 1879; adopted by The Hague convention of 1899 and latterly reannounced, practically in its original form in The Hague convention of 1907 "with re-

spect to the laws and customs of war on land," to the last two of which conventions the United States has formally indicated their adherence.

> "International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.
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> "The most certain guide, no doubt, for the decision of such questions is a treaty or statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations."

Mr. Justice Gray, speaking for this court in Hilton *v.* Guyot, 159 U. S., 113, 163, and citing Fremont *v.* United States, 17 How., 542, 557; *The Scotia,* 14 Wall., 170, 188; Respublica *v.* De Longchamps, 1 Dall., 111, 116; Moultrie *v.* Hunt, 23 N. Y., 394, 396.

Again it has been said that—

> "International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where

there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but trustworthy evidence of what the law really is (Hilton *v.* Guyot, 159 U. S., 113, 163, 164, 214, 215).

"Wheaton places, among the principal sources of international law, 'Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.' As to these he forcibly observes: 'Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles' (Wheaton's International Law, 8th ed., § 15).

"Chancellor Kent says: 'In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law. In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation, that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law' (1 Kent Com., 18)."

*The Paquete Habana*, 175 U. S., 677, 700-701.

What in practice is to be the fair interpretation of the declarations, so oft repeated, that private property "whether belonging to individuals or corporations, is to be respected" and "unless forfeited by crimes or by offenses of the owner" is to "be seized only by way of military necessity" and can "be confiscated only for cause," and "private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible, receipts are to be given."

For what purpose are the receipts to be given except as evidence of the taking and of the obligation and agreement to pay?

In the case at bar, for some reason not explained, no receipts appear to have been given.

The obligation of a belligerent to pay for private property taken or destroyed under circumstances not involving actual military operations—that is, in battle, or the course of bombardment, and the like—is recognized and declared by practically all text-writers who have treated of the subject.

Chancellor Kent, in his Commentaries, says (pp. 92-93):

> "The general usage now is not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places carried by storm, and which repelled all the overtures for a capitulation. Contributions are sometimes levied upon a conquered country, in lieu of confiscation of property, and as some indemnity for the expenses of maintaining order and affording protection. If the conqueror goes beyond these limits wantonly, or when it is not clearly indispensable to the just purposes of war, and seizes private property of pacific persons for the sake of gain, and destroys private dwellings, or public edifices devoted to civil purposes only, or makes war upon monuments of art and models of taste, he violates the modern usages of

war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world."

Hall, in his treatise on International Law, says:

"Of the private property found by a belligerent within the territory of his enemy, property in land and houses, including property in them held by others than their absolute owners, was very early regarded as exempt from appropriation * * * personal property remained exposed to appropriation by an enemy; and so late as the seventeenth century, armies lived wholly upon the countries which they invaded, and swept away what they could not eat by the exercise of indiscriminate pillage. But gradually the harshness of usage was softened, partly from an increase of humane feeling, partly for the selfish advantage of belligerents, who saw that the efficiency of their soldiers was diminished by the looseness of discipline inseparable from marauding habits, and who found, when war became systematic, that their own operations were embarrassed in countries of which the resources were destroyed. A custom grew of allowing the inhabitants of a district to buy immunity from plunder by the payment of a sum of money agreed upon between them and the invader, and by furnishing him with specified quantities of articles required for the use of his army; and this custom has since hardened into a definite usage, so that the seizure of movables or other personal property in its bare form, has, except in a very few cases, become illegal" (pp. 441, 442).

Even if the real property belongs absolutely to one of the belligerent States it cannot rightly or legally be devastated by the forces of the other.

"An occupant may, however, seize the profits accruing from the real property of the State and may make what temporary use he can of the latter, subject it would seem to the proviso that he must not be guilty of waste or devastation. Thus he can use

buildings to quarter his troops and for his administrative services, he receives rents, he can let lands or buildings and make other contracts with reference to them, which are good for such time as he is in occupation, and he may cut timber in the State forests; but in cutting timber, for example, apart from the local necessities of war, he must conform to the forest regulations of the country, or at least he must not fell in a destructive manner so as to diminish the future annual productiveness of the forests."

Hall's International Law, 437, 438.

Halleck states the modern rule as follows:

"The general theory of war is, as heretofore stated, that all private property may be taken by the conqueror and such was the ancient practice. But the modern usage is not, to touch private property on land, without making compensation, except in certain specified cases. These exceptions may be stated under three general heads: (1) Confiscations or seizures by way of penalty for military offenses; (2) Forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and (3) Property taken on the field of battle, or in storming a fortress or town."

2 Halleck's International Law, 68.

"Private property on land is now, as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest."

*Id.*, 67.

"The effect of war upon enemy's property was formerly the same on both land and sea. In former times, enemy's property, property of the subject and the State alike, when taken either upon land or sea, became the prize of the captor. This has been changed by the forces of advancing civilization. Private property on land, not directly fitted or used for warlike purposes, is not, as a general rule, subject to seizure and confiscation by the belligerents. *It*

*can sometimes be taken, used or destroyed for the purpose of subserving an overruling and pressing military necessity.* The taking, use, or destruction in that case is justified by necessity, but it must be a strict one. But never now as in times past, except in cases of such necessity, can an enemy who invades a foreign country lawfully spread out his parties of devastors and take the private property of non-combatants. It is as sacred as if no war existed. But upon the sea it is different. The usages of the ocean lag far behind the usages of the land in becoming amenable to the processes of civilization."

Treatise on International Law, by Cushman K. Davis, 144, 145, 146.

From the date of the promulgation of Dr. Lieber's Instructions, in 1863, in the form of War Department General Orders No. 100, to the present date, as lately evidenced by the signing on its behalf of the "Convention respecting the laws and customs of war on land" (Hague Conference, 1907), the United States has steadily adhered to the position that even in the territory of a hostile State "private property, as well as religious convictions and practices, must be respected," and "private property cannot be confiscated." The fact that we are not able to point to controlling judicial precedents is of small consequence, for the fact that no case has heretofore arisen for adjudication under the principle of law here contended for does not militate against its existence or its strength. So far as the United States is concerned, no occasion for the application of the rule or principle occurred between the close of the Civil War and the 20th of April, 1898. In so far as cases which arose during the Civil War are concerned, the jurisdiction of the Court of Claims was restricted, but the obligation of a belligerent to pay in proper cases has been recognized as a living, vital principle in several adjudicated cases of high authority.

As was said in an able dissenting opinion recently filed in the Spanish Treaty Claims Commission (The Juragua

Iron Co., Ltd., *v.* United States, Commissioner Maury dissenting):

"The law of war has undergone many changes since the time when captives were put to the sword or sent into slavery, and these changes have resulted necessarily from the intellectual and moral growth of the world.

"As an illustration of the silent but irresistible march of this improvement it may be recalled that a little more than a century ago, during our revolutionary struggle with Great Britain, several of the States resorted, as a war measure, to the confiscation or sequestration of debts owing by their citizens to British subjects, a course of conduct which if practiced at this day would, it is needless to add, bring down on the offending nation general reprehension, with a loss of financial standing.

"The case now before us presents for consideration the interesting inquiry whether we have not reached a period in the world's history when it is equally reprehensible for a belligerent to lay violent hands on the tangible personal effects of a citizen of the enemy country happening to be within his territory at the commencement of hostilities.

"Nearly a century ago the Supreme Court of the United States gave a negative answer to a similar inquiry in the case of *Brown v. United States* (8 Cr., 110). Without presuming to question the soundness of that case at the time it was decided, it is worthy of remark that it has been thought that the mind of the Chief Justice who delivered the opinion of the court might have been still under the influence of the powerful reasoning he had employed at the bar in defending the validity of the sequestration of British debts in *Ware v. Hilton* (3 Dall., 199). Indeed, I may say that *Brown v. United States* has not been quite free from criticism in the eminent tribunal itself that decided it. Mr. Justice Field, in his able dissenting opinion in *Miller v. United States* (11 Wall., 268), after quoting from the opinion of the Chief Justice, makes the following comment:

> "'The language of the eminent Chief Justice is perhaps subject to some qualification, if it was intended to state as a rule of public law that all property of the enemy, whether on land or water, was subject to confiscation. Mr. Wheaton, who is authority on all questions of public law, says that by the modern usage of nations, which has acquired the force of law, "private property on land is exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory," and that "this exemption extends even to the case of an absolute and unqualified conquest of the enemy's country"' (p. 317).

"The learned justice then proceeds by way of contrast to make the following quotation from the opinion of the Chief Justice in *United States v. Percheman* (7 Pet., 51), delivered nineteen years afterwards:

> "It is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, *which has become law*, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled" (p. 87).

"The difference in tone between the two cases leaves the impression that the chief justice had either receded from what Justice Field termed *'the severe rule'* laid down in the earlier case, or that international law had undergone a notable change at the time the later case was decided.

"As it transcends the power of any single nation to arrest the development of the law of nations, it is obvious that the decision in *Brown v. United States*, made nearly a century ago, ought not to preclude this Commission from inquiring for itself whether the Powers have since agreed on a rule dif-

ferent from that laid down in the case mentioned, for if they have, that rule must be followed.

"Let us turn now to the accredited writers on international law for light on the question whether nonhostile enemy property is exempt from seizure or confiscation by a belligerent when found in his territory on the breaking out of war.

"The encomium passed on Calvo by Mr. Justice Gray, that 'no international jurist of the present day has a wider or more deserved reputation' (*The Paquette Habana*, 175 U. S., 677, 703), justifies my placing him at the head of the list of authorities I shall consult.

"Looking at sovereignty in the abstract, we readily arrive at what Calvo terms 'the barbarous but logical inference' that a nation can confiscate all enemy property found within its territory at the outbreak of war. But turning aside from this abstract view, the publicist lays down that '*as a matter of fact*, in our day the property of enemies found in the territory of a belligerent State at the breaking out of war is exempted from confiscation and considered as entitled to immunity from the application of the laws of war.' This I take from the fifth and last edition (1896) of Calvo's great work on international law. (Tome 4, § 1915, p. 54.)

"In the same year appeared the '*Principes du Droit des Gens*' of the learned publicist, Rivier. According to him it is a principle accepted by the states that compose the family of nations that private property is *inviolable* in land warfare. (*La propriété privée est inviolable...Tel est le principe aujourd'hui reconnu, entre les États de la société des nations, dans la querre sur terre.* Tome 2, p. 318.)

"In another place the author states that the belligerent who should, at this day, confiscate *the property or credits* of the enemy country or its citizens would provoke disastrous retorsion or reprisal. *Ibidem*, Tome 2, p. 232.)

"Heffter, in his work entitled 'International Law of Europe,' lays down that the old principle that a belligerent could appropriate as booty enemy property in his territory has no place in the more humane code of our day.

"The number of editions this work went through in German and French, to say nothing of one in Greek and another in Polish, bespeaks the estimation in which it has been held.

"I have before me the last French edition enriched by notes from the pen of the learned Professor Geffcken. Following Heffter, he says:

> 'The respect for enemy property situated within the jurisdiction of the adverse party is a consequence of the principle generally observed at the present time which allows enemy subjects domiciled in the territory of the belligerent to continue to reside there so long as they conduct themselves properly."

"The professor in one of these notes indulges in quite a free criticism of the Supreme Court of the United States for what he terms its violation of the principle of immunity by sustaining the policy of the Government during our civil war in seizing cotton as a war measure in the hands of non-hostile owners in the insurgent territory. The court, on the other hand, in a series of cases places its approval of that policy on the distinct ground that as the life of the Confederacy depended as much on cotton as on men the product had thereby become contraband of war and so removed outside of the protection of the principle in question.

"It is important to note, as bearing strongly on the case before us, that each of these views furnishes conclusive evidence that the law of nations not only requires a belligerent to protect innocent enemy property found in his domain at the commencement of war, but also to extend the same protection to such property when invading the territory of the other belligerent.

In the *United States v. Padelford* (9 Wall., 531, 540) the Chief Justice said:

> " 'In the case of *Mrs. Alexander's Cotton*, it was determined that cotton, though private property, was a proper subject of capture by the national forces, during the recent civil war. The court regarded this

particular species of property as excepted, by its peculiar character and by circumstances, *from the general rule of international law which condemns the seizure of the property of private persons not engaged in actual hostilities, though residing in a hostile territory or region.*' (Italics my own.)

"In *United States v. Klein* (13 Wall., 137), another case involving a cotton seizure, the same eminent judge said: '*The Government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of noncombatant enemies from capture as booty of war.*' (Italics my own.)

"Manifestly these two cases show that the Supreme Court no longer regards "the severe rule" laid down in *Brown v. United States* as holding a place in the Law of Nations.

"To these testimonies I will add that of Doctor Oppenheim, the author of a work on international law published in London in 1905. He says:

> "'In former times all private and public enemy property, immovable or movable, on each other's territory could be confiscated by the belligerents at the outbreak of war, as could also enemy debts; and the treaties concluded between many states with regard to the withdrawal of each other's subjects at the outbreak of war stipulated likewise the unrestrained withdrawal of the private property of their subjects. Through the influence of such treaties, as well as of municipal laws and decrees enacting the same, an international usage and practice grew up that belligerents should neither confiscate private enemy property nor annul enemy debts in their territory. The last case of confiscation of private property is that of 1793, at the outbreak of war between France and Great Britain. No case of confiscation has occurred during the nineteenth century, and although several writers maintain that according to strict law the old rule, in contradistinction to the usage which they do not deny, is still valid, it may safely be maintained that it is obsolete, and that there is now a customary rule of international law in existence prohibiting the confiscation of private

enemy property and the annulment of enemy debts on the territory of a belligerent. Accordingly, the embargo of enemy ships in the harbors of the belligerents at the outbreak of war is no longer made use of, and a reasonable time is granted to them to leave those harbors. On the other hand, this rule does not prevent a belligerent from suspending the payment of enemy debts till after the war for the purpose of prohibiting the increase of enemy resources; from seizing public enemy property on his territory, such as funds, ammunition, provisions, and other valuables; and from preventing the withdrawal of private enemy property which may be made use of by the enemy for military operations, such as arms and munitions. And it may be expected in the future that those enemy mail boats which were built from special designs for the purpose of quickly turning them into cruisers of the navy will be prevented from leaving the ports of a belligerent at the outbreak of war. (Vol. 2, § 102, pp. 111, 112.)'"

In Mitchell *v.* Harmony (13 Howard, 115), which involved an action by Harmony, a native of Spain and an army trader, against Mitchell, an officer of the United States army, to recover damages for trespass in the alleged wrongful seizure, in Mexico, of his goods, it was said (Taney, Chief Justice, speaking for the court):

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner; but the officer is not a trespasser.

"But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible

> to define the particular circumstance of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

The verdict and judgment in favor of the plaintiff Harmony were sustained, the court indicating that the fact that the trespass occurred beyond the limits of the United States did not militate against the jurisdiction of the trial court, citing McKenna *v.* Fisk, 1 Howard, 241, as authority upon that point.

United States *v.* Russell, 13 Wallace, 623, came before this court on appeal from the Court of Claims. There three steamboats, owned by Russell, during the war of the Rebellion were used under military orders in the public service, as transports. Certain payments for the service were made in each case by the Government to Russell, but he claimed a larger sum, which being refused he instituted suit to recover.

Mr. Justice Clifford speaking for the Court and citing Mitchell *v.* Harmony *ubi supra,* said:

> "Private property, the Constitution provides, shall not be taken for public use without just compensation and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the Government to deprive the owner of his property without his consent." * * *
>
> "Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and

appropriated to the public use, or may even be destroyed without the consent of the owner."

* * * * * * *

"Where such extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the Government is ample to supply for the moment the public wants, * * * but the public danger must be immediate, imminent and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay, * * * it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified."

"Such a justification may be shown, and when shown, the rule is well settled * * * that the Government is bound to make full compensation to the owner." * * *

"Such a taking of private property by the Government when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the Government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the Government must make full restitution for the sacrifice" (p. 629).

* * * * * *

The case of the United States *vs.* Pacific Railroad Company, 120 U. S., 227, strongly relied upon by the learned court below, involved cross appeals from the judgment of the Court of Claims, and grew out of an action by the railroad company to recover from the United States certain freights due for services rendered. The defendant admitted

a balance to be due from it on such account, unless they were entitled to offset the cost of certain labor and materials alleged to have been furnished during the war of the rebellion, and used in the reconstruction of certain bridges on the line of the company. The bridges in question had been destroyed under instructions of General Rosecrans, commanding the Federal forces in Missouri, to "use every means * * * to prevent the advance of the enemy." The court found that the exigency "was of the gravest character," and that the destruction ordered was "an imperative military necessity."

This court, in disposing of the case, speaking through Mr. Justice Field, said:

> "The injury and destruction of private property caused by their (the armies) operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the Government. By the well settled doctrines of public law it was not responsible for them."

But the learned Justice immediately proceeded to draw a distinction between the destruction of or injury to private property caused by battle or bombardment or with a view to impeding the advance of the enemy, that is to say, losses which the belligerent occasions "not wilfully, but through necessity and mere accident," and such as result from acts done by the belligerent "deliberately and by way of precaution," clearly indicating that in the latter case the obligation of the State to compensate the owner is imperative. In support of this distinction the learned Justice said:

> "Vattel, in his Law of Nations, speaks of damages sustained by individuals in war as of two kinds—those done by the State and those done by the enemy. And after mentioning those done by the State deliberately, and by way of precaution, as when a field, a house, or a garden belonging to a private person

is taken for the purpose of erecting on the spot a town rampart or other piece of fortification; or when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy; and stating that such damages are to be made good to the individual, who should bear only his quota of the loss, he says: 'But there are other damages, caused by inevitable necessity, as for instance, the destruction caused by the artillery in retaking a town from the enemy. These are merely accidents; they are misfortunes which chance deals out to the proprietors on whom they happen to fall. The sovereign, indeed, ought to show an equitable regard for the sufferers, if the situation of his affairs will admit of it; but *no action* lies against the State for misfortunes of this nature—for losses which she has occasioned, not willfully, but through necessity and by mere accident in the exertion of her rights. The same may be said of damages caused by the enemy. All the subjects are exposed to such damages, and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the State strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted, and every individual in the State would be obliged to contribute his share in due proportion, a thing utterly impracticable." (Book III, c. 15, sec. 232.)

And, citing Mitchell *v.* Harmony, *ubi supra,* laid down the following rule, which would seem to be decisive of the case at bar:

"In what we have said as to the exemption of the Government from liability for private property injured or destroyed during war by the operations of armies in the field or by measures necessary for their safety and efficiency, we do not mean to include claims where property of loyal citizens is taken for the service of our armies, such as vessels, steamboats, and the like, for the transport of troops and munitions of war; or buildings to be used as storehouses

and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated. In such cases, it has been the practice of the Government to make compensation for the property taken. Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause."

The case of Putegnat Heirs, before the Mexican Claims Commission in 1871 (4 Moore's International Arbitrations, 3718), in many of its features was similar to the case at bar. Commissioner Wadsworth, in delivering the opinion of the tribunal awarding the value of the goods destroyed and interest thereon, said:

"General Avalos, commanding at Matamoras, in the service of the Mexican government, during the siege of that place in October, 1851, by Caravajal, seized the storehouse in which Putegnat's goods were on sale at the time, turned the storehouse into a fortification, from whence to resist and annoy the enemy, and forbade the removal of the goods to a place of safety. In the course of the contest the house was set on fire by the shells of the enemy and was destroyed.

"In determining whether there is a liability in this case on the part of the government of Mexico to pay the value of the goods thus destroyed by the enemy, I shall proceed upon the conclusion, which I draw from the facts in the case, that the goods were lost because of the seizure of the house and the order forbidding their removal. I shall treat the case as a seizure of the house and goods by General Avalos for the public service, and their destruction by the enemy as a necessary consequence of the nature of the service to which, for the public benefit, the goods were subjected. I shall assume that if the government would be liable for the house destroyed by the enemy's fire, it would be liable for the goods also, perhaps much more so, as they might have been removed to a place

of safety in a few minutes, since the quantity was not large.

"I conceive that the government of Mexico is not liable for property destroyed by the enemy during the siege of a town without any complicity on its part, nor for property necessarily and incidentally destroyed by the government in its fire upon an enemy. To make the government responsible, the property must be taken by its authority to be used against the enemy (to assist an attack or make good a defense, for instance) or destroyed or carried away to prevent the enemy from using it. This is what Vattel calls taking deliberately or by way of precaution. 'As when a field, a house, or a garden, belonging to a private person is taken for the purpose of erecting on the spot a town rampart or any other piece of fortification, or when his standing corn or storehouses are destroyed to prevent their being of use to the enemy, such damages are to be made good to the individual, who should bear only his quota of the loss.' (Book 3, c. 15, p. 402; see, also, Grotius, Book 3, c. 20, sec. 7.) Property taken or destroyed for public use lawfully by the civil or military authorities must be paid for by the Government."

Citing—

Mitchell *vs.* Harmony, 13 How., 115.
Hale *vs.* Lawrence, 3 Zabriskie, 728.
Grant *vs.* U. S., 1 C. Cls., 41.

In the case of *Grant vs. U. S.* (1 C. Cls., 41), which was a claim for the value of private property, consisting of mills, dwelling-houses, storehouses, etc., destroyed and abandoned in Arizona by order of the commander of the United States forces in 1861, the Court of Claims carefully reviews the law governing such claims, quoting with approval passages from Vattel, Grotius, and *Mitchell vs. Harmony*, above referred to, and concludes with the following clear and concise statement of the law as gathered from the authorities and text-writers:

"The authorities cited are direct and emphatic, and are supported by every writter of respectability upon

public and national law. It may safely be assumed as the settled and fundamental law of Christian and civilized States that governments are bound to make just indemnity to the citizen or subject whenever private property is taken for the public good, convenience, or *safety*" (p. 44).

In the case of the *United States v. Lynah* (188 U. S., 445) many of the foregoing authorities are reviewed, and the law governing the appropriation of private property for governmental use is distinctly and clearly set forth as follows:

"The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the Government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary, and a governmental, right. When the Government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the Government takes possession of property under the claim that it belongs to the Government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the Government to pay for that which it claims to own. Very different from this proprietary right of the Government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of Government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand. So, the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

* * * * * * *

"Whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

* * * * * *

"That which the officers did is admitted by the answer to have been done by authority of the Government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the Government did, acting under its direction, resulted in an appropriation, it is to be treated as the act of the Government."

Citing South Carolina *vs.* Georgia, 93 U. S., 4; Wisconsin *vs.* Duluth, 96 U. S., 379; U. S. *vs.* Great Falls Mfg. Co., 112 U. S., 645.

* * * * * * *

"But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the Government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th amendment of paying just compensation."

The right of the Juragua Iron Company to compensation for property taken and appropriated deliberately and as a precautionary measure to prevent the spread of disease among the troops of the United States would seem to be as meritorious as the claim of a citizen whose ships were used to transport troops, or whose supplies and provisions were taken to feed and clothe them, or whose medicines were made use of to cure their bodily ills.

The case at bar is not a case such as *Langford v. United States* (101 U. S., 341, 346), where an officer of the United States took and held possession of the land of a private citizen under a claim that it belonged to the Government; nor is it an action to recover for the use and occupation of real

estate, which requires a contractual relation to support it (Hill *v.* United States, 149 U. S., 593, 598); nor is it an action to recover damages for a tort committed by General Miles, for which he and not the United States would be responsible (Schillinger *v.* United States, 155 U. S., 163); but it is an action to recover compensation for the appropriation of the private property of an individual citizen by the Government exercising the right of eminent domain from which arose an implied contract on the part of the Government to make good the loss thereby inflicted.

It ought not to be successfully contended that such an appropriation and destruction of property as is involved in this case does not imply an obligation on the part of the Government to reimburse the owner *pro tanto* for the sacrifice. The property destroyed was non-military and non-contraband in character. It did not lie in the pathway of hostilities. It was not involved in any military operation, either present or prospective. It was not destroyed in the course of a bombardment nor of an attack, nor was it destroyed to harass or embarrass the enemy nor to prevent it from falling into his hands or of affording him comfort or subsistence. It was the property of a loyal citizen of the United States, placed where it was found in the furtherance of the trade and commerce of the United States, and in furtherance of the public policy of the United States as expressed in its ancient treaties with Spain. It was neither wantonly nor tortiously destroyed by the military officer in charge of operations in its vicinity, but it was coolly and deliberately appropriated and destroyed for the general benefit that such action might have upon the health of the troops under his command. In so far as compensation for the loss inflicted is concerned, the case would seem to fall within the principle illustrated by the deliberate and precautionary taking from its private owner of a house or a garden and the erecting thereon of a town rampart or other piece of fortification, in which case all agree that the damages

suffered should be made good to the individual, who should only be required to bear his quota of the loss.

It is respectfully submitted that the judgment of the Court of Claims should be reversed and the case remanded to that court, with an instruction to enter judgment upon the findings of fact in favor of the claimant for the sum of $31,116.

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